
U.S. Department of Labor
Office of Administrative Law Judges
1111 20th Street, N.W.
Washington, D.C. 20036

87-ERA-25

MARSHALL TREIBER,
Claimant,

v.

TENNESSEE VALLEY AUTHORITY, ET AL,
Respondents.

ORDER

These proceedings arise under the "whistleblower" protection provisions of the Energy Reorganization Act of 1974 (ERA), § 210(a), as amended, 42 U.S.C. § 5851, implemented by 29 C.F.R. § 24.1 *et seq*.

Respondent Tennessee Valley Authority (TVA) has moved for summary judgment under Fed. R. Civ. P. Rule 56, and the Department of Labor's rule for summary decision set forth at 29 C.F.R. 518.40(a). Systems Energy Resources, Inc. (SERI) has moved for summary judgment on the grounds that there is no evidence that Mississippi Power and Light, (MPL), and Systems Energy Resources Inc., (SERI), blacklisted or otherwise discriminated against Claimant as a result of his employment at MPL. In addition, SERI argues that Claimant's allegations are outside the scope of the Act as they are directed towards an employer and not a governmental entity.

Because of the time elapsed since Claimant's appeal of the Wage and Hour determinations to the office of Administrative Law Judges, a review of the procedural history appears appropriate. Claimant, Marshall Treiber, filed complaints with the Department of Labor's Wage and Hour Division offices concerning what he perceives to be violations of certain protected work activities. In substance, he complains that he was terminated on January 29, 1986, from MPL as Supervisor of Nuclear Training Support at its Grand Gulf Nuclear Station, after expressing his opinion that certain incidents of work were substandard. According to Claimant, certain incidents occurred thereafter which suggested

[Page 2]

blacklisting on the part of MPL. In July, 1986, he was flown to New York to interview at Long Island Lighting Company's (hereafter LILCO) Shoreham Nuclear Power Station. Once he arrived, he was given only a token interview. A similar incident occurred in September, 1986, when the engineering firm of Stone and Webster contacted Claimant for an interview. when he called back as directed, to set up an interview, Mr. Dunavan of Stone and Webster, would not accept his call.

On March 4, 1987, Claimant accepted a six month assignment at TVA working as a contractor, through CDI, a job shop. On March 11, 1987, he was terminated by Richard Thompson, his superior. According to Claimant, his work had not then been reviewed. Thus, there was no basis for his termination. Claimant alleges that someone at TVA contacted or was contacted by persons at MPL who were trying to blacklist him.

On April 13, 1987, Robert Brock of the Wage and Hour Division, notified Claimant of the results of compliance actions. According to Mr. Brock, the complaint filed by Claimant on March 16, 1987, alleging discriminatory conduct by MPL, was not substantiated by their investigation and that his allegations of blacklisting were unprovable as there was no substantiation that MPL/SERI had contacted, or was contacted by LILCO, Stone and Webster, or TVA. Thus the complaint was dismissed.

Thereafter, Claimant received Bennie Edwards's letter dated April 15, 1987, explaining that there was insufficient information to support the claim that he had been terminated because TVA cooperated in a blacklisting scheme with MPL. Mr. Edwards was then employed at the Department's Wage and Hour Division office in Nashville, Tennessee.

Claimant timely appealed these findings by requesting hearings before this office. (Western Union Mailgram in official file).

On May 5, 1987, the undersigned, with the consent of the parties, issued a Protective Order waiving the statutory time constraints to afford Claimant sufficient time to obtain representation. A teleconference was held between all parties, on May 28, 1987. At that time; Claimant informed that he had been unable to obtain counsel.

[Page 3]

TVA gave notice of deposition to Claimant on June 1, 1987. On June 1, 1987, a Protective Order was issued, directing the parties to refrain from scheduling Claimant's deposition for one month in order that he might continue his efforts to obtain counsel.

Mark Hellner, an attorney in Chicago, Illinois contacted this office on June 26, 1987, regarding his possible representation of Claimant. Mr. Hellner had not then been able to meet with Claimant and, therefore, could not commit to representation. He requested that

the protective order scheduled to end July 1, 1987, be extended one month. Neither TVA or SERI objected to the extension.

An Order issued on August 20, 1987, directing the parties to submit an anticipated discovery schedule by August 27, 1987. On August 27, 1987, Mr. Hellner wrote requesting that discovery be extended from the 60 day period to December 31, 1987. According to Mr. Hellner, he had only tentatively agreed to represent Claimant as he still had not met with him. Mr. Hellner thought that after a longer period for discovery, he would be in a better position to determine if he would represent Claimant.

In response to the Order of August 20, 1987, TVA answered on September 2, 1997, that it could not determine its discovery schedule until Claimant's deposition was taken, but believed it could conclude discovery by December 31, 1987. SERI responded on September 10, 1987, stating that it did not oppose extension of the discovery period, but requested that Mr. Hellner verify his representation of Claimant by September 15, 1987.

The undersigned issued an Order on September 16, 1987, ordering discovery to be completed by December 31, 1987.

On October 22, 1987, TVA gave notice of deposition of Claimant, for November 16, 1987.

Via letter of December 21, 1987, Mr. Hellner advised that although he had met with Claimant on September 12, 1987, the local attorney he had associated as trial counsel had not formally filed an appearance on Claimant's behalf. Mr. Hellner then stated that he could not diligently pursue the matter, and that he had begun to look for new counsel for Claimant.

TVA via letter of January 26, 1988, confirmed the December 23, 1987 teleconference between the parties. It was noted that attorney Mark Hellner was continuing to seek counsel for Claimant.

TVA informed on March 16, 1988, its notice to depose Claimant on May 18, 1988. An Order, issued May 10, 1988, for Claimant to avail himself for the deposition scheduled for May 18 or May 23, 1988.

Claimant's deposition occurred in Raleigh, North Carolina, on May 18, 1988. Therein Claimant testified that he believed he had been terminated from TVA because of blacklisting by MPL, based on the fact that he was terminated after working at TVA for only 6 days, and the statement by his superior, Richard Thompson, "we've gotten input on you". Claimant, did not provide direct evidence of "blacklisting" by MPL/SERI, or specify contact between MPL and LILCO, Stone and Webster, or TVA.

An Order issued on May 25, 1988, required the parties to inform of the status of the claim and their anticipated time schedules. Mr. Hellner, via letter of May 31, 1988, notified of his intent to postpone discovery until a serious discussion of the possibility of settlement had taken place.

TVA responded via letter of June 6, 1988, stating that it was ready for a hearing, as it had taken Claimant's deposition and completed discovery. Via letter of June 10, 1988, TVA informed that it had rejected Claimant's settlement proposal, and expressed surprise that Claimant was contemplating discovery at this point in time.

SERI informed via letter of June 10, 1988, of its intent to move for summary judgment following arrival of the deposition transcript.

On June 13, 1988, SERI submitted that Claimant has been dilatory in the prosecution of this claim, and should not be allowed to subject SERI to additional costs. SERI also informed of its rejection of the settlement agreement.

An Order issued on July 8, 1988, directing Claimant to submit within 10 days, the name of his counsel, his proposed discovery schedule, and trial avoid dates.

[Page 5]

Affidavits of the Respondents were provided in June and July, 1988, to wit:

Dan Deford, Richard Thompson's supervisor at TVA, asserted that he concurred with Mr. Thompson's decision to terminate Claimant because "he was not working out". Prior to Claimant's termination, Mr. Deford stated that he did not talk to anyone outside of TVA about Claimant, and specifically at MPL, Stone and Webster, or LILCO. He also averred that he had no personal knowledge of Claimant's employment at MPL or about anything which may have occurred to Claimant while employed by MPL.

James Hartman, Senior Trainer at TVA's Sequoyah plant, was directed by Richard Thompson to assist Claimant in getting settled during his first week at the TVA Sequoyah Nuclear Plant. Mr. Hartman averred that Claimant was suitable for working in the field by himself and that prior to Claimant's termination he did not speak to anyone at MPL, Stone and Webster, or LILCO, and no one at those companies spoke with him. Mr. Hartman stated that he had no personal knowledge of any contact between TVA and MPL, Stone and Webster, or LILCO.

Richard Thompson, TVA supervisor of Training Staff, Engineering Staff Assurance, hired Claimant and was Claimant's immediate supervisor. He provided his agreement with Mr. Hartman's assessment of Claimant; that Claimant lacked the presence to be a successful trainer. Mr. Thompson stated that Claimant's termination was consistent with the general policy of terminating contractors when it was discovered that they would not work out.

Mr. Thompson also stated that Claimant was terminated because there was a mismatch of his skills and the job. According to Mr. Thompson, prior to Claimant's termination, he had no communications about Claimant with anyone at MPL, Stone and Webster, or LILCO. Mr. Thompson also stated that he had no personal knowledge of Claimant's employment at MPL or about anything which might have happened to him while he was employed by MPL.

On July 22, 1988, TVA submitted its Motion for Summary Judgment and brief in support. In summary, it submitted that Claimant can not carry his burden of proof in that he can not establish discrimination by TVA in violation of Section 210 of the Energy Reorganization Act of 1974, 42 U.S.C. § 5851 (1982)

[Page 6]

(the Act); that Claimant's mere suspicions do not amount to evidence of discrimination.

Mr. Hellner informed on July 25, 1988, that he was Claimant's counsel of record and requested leave to obtain depositions of several TVA and MPL/SERI employees before the decision on the Motions for Summary Judgment. Mr. Hellner requested holding in abeyance disposition of Respondent's Motions for Summary Judgment until after discovery-depositions by Claimant were completed.

On July 29, 1988, SERI filed its Motion for Summary Judgment, and expressed its opposition to Claimant's request to take depositions at this late date. In its Motion for Summary Judgment, SERI argued that Claimant has not sustained its burden of proof in establishing discrimination by SERI, and that Claimant's charge of blacklisting is not covered by the Energy Reorganization Act of 1974 (the Act), because such only applies to whistleblowers who provide information to governmental entities, not to employer corporations.

Claimant filed his Motion for Limited Discovery on September 21, 1988. Therein he requested leave to take 8 depositions, and respond to both motions for summary judgment. Claimant explained the need for the depositions arising out of the fact that the evidence was in the hands of the employers and cited several cases for the proposition that summary judgment is improper for resolving claims which turn on the motivation and intent of an employer.

On September 30, 1988, TVA filed its Memorandum in Opposition to Claimant's Motion to Take Discovery. It argued that Claimant had not made an effort to initiate discovery prior to August 31, 1988, and there is no evidence to support a genuine issue of fact.

DISCUSSION

"Summary judgment is appropriate where the Court is satisfied 'that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.'" *Celotex Corp. V. Cartrett*, 106 S.Ct. 2548, 2556 (1986) (quoting Fed. R. Civ. P. 56(c)). See also 29 C.F.R. § 18.41 (July 15, 1983).

[Page 7]

In its brief, TVA asserts that it is entitled to summary judgment because Claimant has not shown that he can satisfy his evidentiary burden; specifically that there was contact between MPL and TVA, and that the information was acted on by someone at TVA, causing Claimant's termination. According to TVA, Claimant has no evidence whatsoever of any contacts between TVA and MPL, as evidenced by the affidavits. TVA argues that Claimant cannot rest on suspicions and theory, but instead must have factual information upon which to base his claims against TVA.

MPL/SERI, in support of its Motion for Summary Judgment, argues that it is entitled to summary judgment because there is no genuine issue of material fact. MPL/SERI points to the fact that Claimant admitted in his deposition that he had no direct evidence of any contact with LILCO or Stone and Webster, evidence necessary for establishing a claim of blacklisting under Section 5851 of the Energy Reorganization Act. MPL/SERI also contends that Claimant's allegation of blacklisting is not covered by the Energy Reorganization Act of 1974, Section 210(a), as amended, 42 U.S.C. § 5851(a), because the ERA is designed to protect whistleblowers who provide information to governmental entities, not to the employer corporation.

Claimant's proposition that summary judgment should not be granted where motive and intent are involved is applicable in this case where a motive to blacklist, if any, would lie in the hands of the respondents.

Each Motion for Summary Judgment is premised upon its accompanying affidavits. These sworn statements are clear that the affiants had no personal knowledge of the matter of which they spoke, but their silence regarding knowledge otherwise is of concern. For instance, Mr. Thompson's statement that he had no personal knowledge of Claimant's employment at MPL or what might have happened to him while so employed is simply a statement that he had not witnessed such by personal observation or hearing. In light of Mr. Thompson's alleged response to Claimant's inquiry of why he had been terminated, i.e. "we've gotten input on you", this statement does not preclude an inference that he knew of Claimant's complaints at MP&L through others, and acted upon this information. The same conclusions generally can be said about the statements of each affiant regarding their contact with personnel at MP&L, Stone and Webster, and LILCO. For this reason Claimant will be allowed

---

[Page 8]

discovery prior to a ruling on the motions.

With regard to the position that Claimant has had ample opportunity to complete his discovery, I find such without merit. His complaint exists under an Act of Congress which is implemented by Agency regulations. As such, his opportunity to locate counsel familiar with the legislation and regulations for addressing the complaint is only remotely related to an ability to obtain counsel in matters that concern the average individual, *i.e.* state and local laws and ordinances of which there are specialists in most any city, town, or burg. Since Mr. Hellner's first appearance in this matter, it has been clear that the logistics of his office in Chicago and Claimant's residence and work in North Carolina prevented the usual development and presenting of a claim for disposition.

Considering this and not knowing of Claimant's financial ability to travel to and from Chicago to meet with his counsel, or to fund the expenses associated with deposing witnesses out of state, I do not find facts sufficient to conclude that discovery at this time is inappropriate due to delay. Accordingly,

IT IS ORDERED that Respondents' Motions for Summary Judgment are taken under advisement until Claimant has completed the discovery requested.

IT IS ORDERED that Claimant complete the discovery requested in Mr. Hellner' letter of July 22, 1988, on or before the 60th day from the date of this Order.

LEAVE IS GRANTED for the Parties to submit final position statements regarding each Motion for Summary Judgment within 20 days of the completion of discovery by Claimant.

At Washington, D.C. Entered: 10/26/88

James L. Guill
Administrative Law Judge